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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	**CS Docket No. 99-230**
Competition in Markets for the	)	
Delivery of Video Programming	)	

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To the Commission:

REPLY COMMENTS
OF THE
COMPETITIVE CABLE COALITION

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SUMMARY

The newly-formed Competitive Cable Coalition (the "Coalition"), files these Reply Comments in the Commission's annual assessment of the status of competition in the market for video programming distribution. The Coalition is comprised of a variety of alternative video program providers, ranging from large entities affiliated with LECs, entities offering a variety of services including telephony and video services, and mid-sized and even small cable and wireless cable companies. What the Coalition members have in common is their concern about the incumbent cable companies continuing dominance of the video marketplace and the Federal Communications Commission's (the "Commission") failure to aggressively address and remedy a wide variety of anticompetitive practices. Irrespective of size or affiliation, in order to effectively compete with incumbent cable operators all multichannel video providers require access to programming on competitively fair terms and conditions, and access to MDU residents.

The video distribution market is, very slowly, becoming more competitive as entities such as those comprising the Coalition commit resources and take substantial risks to compete with the cable incumbents. Cable incumbents, however, continue to dominate the market to an extraordinary degree: the most recent data shows that 82% of the market is accounted for by incumbent cable entities, down from 85% last year. The incumbents' contention that, in light of the incumbents' slow market decline to 82%, the Commission need not concern itself further with competitive issues is absurd. Moreover, the 82% dominance touted by cable industry commenters as proof the industry is "robustly" competitive is misleading because it represents nothing but a calculation based on nationwide data. Video distribution is a market-by-market

battle, and the cable industry's widespread movement toward clustering means that many of the nation's local franchise markets are even more dominated by one cable entity than was true in earlier years when cable incumbents accounted nationally for virtually 100% of the market. This important shift in the competitive balance in local markets, epitomized by TCI's strong push for dominance in a number of Midwestern markets, Cablevision's acquisition of TCI's 850,000 subscribers in New York City, ATT/MediaOne's plan to acquire of Time Warner systems in the Boston area, and Comcast's plan to operate most of the existing cable systems in the Washington, D.C. area, makes the modest decline in cable incuments' nationwide dominance virtually meaningless.

The Coalition urges the Commission to readdress the basic issue of the scope of its jurisdiction under § 628 of the Cable Act and to play a more active regulatory role in two areas in which anticompetitive practices on the part of the incumbent cable industry are rampant. The first of these is program access, both with respect to the unlawful withholding of programming by integrated cable entities, and by price discrimination which obligates new competitors to pay substantially more than their incumbent competitors for the same programming. The record in this proceeding is replete with evidence that incumbent cable operators can and do utilize their control over large blocks of cable subscribers to extract steep discounts unjustified by any relevant cost savings. Exclusive agreements between unaffiliated program vendors and incumbent cable operators remain a significant barrier to fair competition, especially when an incumbent cable operator that controls a large percentage of the regional or national market obtains exclusive agreements and uses them against a competitor in a single franchise market. To date, the Commission has erroneously interpreted § 628 of the Cable Act to apply only to cable programming distributed by satellite, even when programming previously distributed in that fashion has been migrated to terrestrial distribution with the purpose and effect of evading the pro-competitive provisions of § 628.

Programming is the essence of the video distribution market. If nascent competitors cannot acquire programming that is attractive and offer it to their target subscribers, no other aspect of competitive entry is important. Consumers, of course, do not generally know or care about the subtleties of different delivery methods. What they care about most is the selection of programming available to them, and the price being charged. If competitors cannot deliver programming such as local sports because a cable competitor who owns or controls the programming refuses to make it available, competitive entry is severely burdened and ultimately diminished. The Commission has ample jurisdiction under § 628 to address and resolve such matters, but has heretofore improperly refused to assert it. If competition is going to flourish, the Commission must play a more active role in curbing the anticompetitive practices of the incumbent cable industry.

Similarly, the tendency of incumbent cable operators to deny new competitors access to existing inside wiring in MDUs is well known to the Commission. Approximately 30% of the retail subscriber market for video distribution is found in MDUs. For a variety of reasons, the existing cable inside wiring rules are inadequate, particularly their failure to address factual circumstances which arise daily. Many MDU owners will not permit a second supplier to overbuild existing wiring because of the disruption such construction can cause. In such circumstances, cable incumbents frequently claim, but fail to prove, that they own the inside wiring. The Commission has done little or nothing to address these matters. Although the

Commission adopted cable inside wiring rules some time ago, they are inadequate, have been under reconsideration since 1997, are extremely complex, and fail to address the underlying need for competitors wishing to serve MDUs to have a broad right to use existing video distribution wiring when the cable incumbent has lost the customer served by that wiring. Furthermore, perpetual exclusive contracts between cable incumbents and owners are no longer justified and should be banned. So long as perpetual exclusive contracts continue to frustrate competitive entry into MDUs, tenants will never enjoy the benefits of unrestrained, head-to-head competition in the multichannel video marketplace.

The Coalition believes the Commission has adequate statutory tools today to address many of the unresolved program access and MDU access issues, and it urges the Commission to proactively exercise its existing authority. Numerous provisions of the Cable Act, particularly § 628 addressing programming, and countless Supreme Court cases emphasizing the broad scope of the Commission's statutory authority to address the dynamic communications industry, provide the Commission with all the tools it needs to address program access and MDU access issues. The Commission's hesitancy to act with respect to program access and MDU access only encourages the incumbent dominant cable industry to abuse its current market status to inhibit or delay new competition. To the extent the Commission believes it lacks adequate statutory authority, it should formally request additional statutory authority from Congress to address these issues.

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To the Commission:

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I. INTRODUCTION

The Competitive Cable Coalition (the "Coalition") hereby respectfully submits the following Reply Comments in response to the Federal Communications Commission's (the "Commission" or "FCC") *Notice of Inquiry* ("*NOI*") in the above-captioned proceeding. The Coalition's Reply Comments focus on the need for the Commission to take proactive measures to foster competition in the multichannel video programming distribution ("MVPD") market by eliminating the ability of incumbent cable operators to engage in anticompetitive program access, pricing, and inside wiring practices.

The Coalition is comprised of a diverse group of terrestrially-based wireline and wireless competitive cable overbuilders who seek to introduce viable competition to incumbent cable operators (the "Competitive Cable Providers"). The members of the Coalition range in size from large regional service providers such as Ameritech New Media, Inc. ("Ameritech"), BellSouth Entertainment, Inc. ("BellSouth") and RCN Corporation ("RCN"), to mid-size regional providers such as Knology Holdings, Inc., to smaller local providers serving only a handful of communities such as Hiawatha Broadband Communications, Lexcom Cable and Seren Innovations, Inc.[1] Collectively the members of the Coalition serve hundreds of markets and offer competitive choice for millions of consumers.

The Coalition was formed by the Competitive Cable Providers in response to the anticompetitive practices of incumbent cable operators, who have leveraged their incumbency and market dominance to impede access to essential programming or to obtain preferential pricing and other terms of carriage, and who seek to deny competitive suppliers access to multiple dwelling unit ("MDU") residents. Irrespective of size or affiliation, in order to effectively compete with incumbent operators, all multichannel video providers require access to programming at equitable prices, as well as access to MDU residents, who constitute approximately 30% of all U.S. households. Recognizing the vital nature of program access, the Coalition seeks to ensure fair and competitive program access rules and regulations in order to prevent cable incumbents and programming providers from engaging in discriminatory activities against Competitive Cable Providers through exclusive contracts, inequitable pricing and similar tactics that have been consistently employed to thwart competition. The Coalition also seeks more proactive regulation in the area of MDU access.

A number of the Coalition's members individually filed comments addressing these issues in the initial stage of this NOI ("Initial Comments"). The Coalition, in these Reply Comments, reinforces and expands upon the Initial Comments, and responds to a number of

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[1] A brief description of the Coalition members appears as Appendix A to these Reply Comments.

misleading and inaccurate statements on the part of incumbent cable providers with respect to the state of video competition.

II. STATE OF COMPETITION IN THE MARKET FOR MULTICHANNEL VIDEO PROGRAMMING

A. Cable Incumbents Continue to Dominate the MVPD Market.

The largest Multiple Systems Operator ("MSO") commenters maintain that competition in the market for multichannel video services is "becoming vibrantly competitive."[2] AT&T goes even further, urging the Commission "to recognize that the MVPD marketplace is not *becoming* competitive, it *is* competitive."[3] The nationwide market share for the biggest cable operators is down, they say, because most "new customers" in the MVPD market are choosing DBS or another competitor over cable incumbents.[4] Regardless of their current market share, the MSOs assert, the multibillion dollar cable companies have no real market power anyway.[5]

The Coalition agrees that competition is emerging in many markets, and thriving in some, thanks primarily to the powerful pent-up demand among consumers everywhere for alternatives to entrenched cable incumbents. It is also true that the Competitive Cable Providers, as well as other competitors, are attracting new customers by offering superior technology, quality service, and good economic value. Yet the fact remains that -- by any traditional economic measure -- cable incumbents continue to dominate the MVPD market and the inroads made by all

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[2] *See, e.g.*, NCTA Comments, at 7.

[3] AT&T Comments, at 2 (emphasis in original).

[4] NCTA Comments, at 4-5.

[5] *Id.* at 13-14.

competitors to the incumbent cable providers to date are still quite limited. A key to this modest success and to future success is the continuing federal commitment to the elimination of barriers to competition and to establishing a level the playing field among all competitors in the MVPD market.

B. Despite DBS Market Gains, the Incumbents Continue to Dominate the MVPD Market.

In assessing the overall state of competition in the MVPD market, the largest MSOs generally have one answer: look at the growth in DBS subscriber numbers. While that growth has indeed been impressive, it is wrong to conclude from it that the largest MSOs no longer have a stranglehold over the MVPD market. There are several reasons why this is so. First, cable incumbents still has an 82% market share. Second, the mere fact that most new customers choose DBS is insignificant. In fact, the reported three percent nationwide decline in the cable incumbents' market share (from 85% in 1997 to 82% in 1998) is meaningless to a competitor who is struggling in an individual franchise area to compete without access to vital programming. It is entirely possible that even if the cable incumbents' market share has declined nationwide, their market share in most franchise areas has not declined. In addition, increased clustering of cable companies, which even the incumbents do not dispute, enhance the incumbents' control over programming as cable entities consolidate.[6]

The General Accounting Office (the "GAO"), likewise concludes that despite the gains

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[6] In the metropolitan New York City market, for example, Cablevision's acquired more than 850,000 cable subscribers from TCI last year. Pending acquisitions in the Washington, D.C. and Baltimore, MD markets will make Comcast the overwhelmingly dominant cable company in those markets. Appendix B hereto consists of a series of cluster maps prepared by Ameritech which graphically demonstrate the erosion of intra-market cable competition in certain Midwestern cities.

made by DBS providers, the MVPD market today remains "not very competitive."[7] This GAO report further notes that the growth in DBS subscribership has been greatest in rural areas, beyond the reach of conventional wireline cable operators,[8] and, as the Competitive Cable Providers know all too well, that "competition in this industry really plays out in local markets."[9]

Second, as promising as DBS technology is, that service is not for everyone. Even if Congress does enact a legislative solution this year that allows DBS providers to carry local broadcast signals, technical and financial obstacles will still prevent DBS operators from carrying local signals in most smaller markets for many years. In addition, many consumers have no compelling need for the scores of movie, sports, and pay-per-view channels offered by DBS providers, and neither the time to watch nor the money to pay for it. Nor do they want -- or in some cases are they able -- to pay for installation costs or long term service contracts required to take advantage of this service.

Third, even with the encouraging subscribership gains made by DBS providers, the largest cable operators continue to possess so substantial a share of the market for video programming viewers across the country that they can readily compel cable programmers and broadcasters to grant them exclusivity, preferential pricing, and other advantageous terms as a condition for widespread carriage. These advantages unfairly tip the scales of competition in favor of the largest MSOs, allow them to retard the entry and growth of other MVPDs, and

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[7] *Telecommunications: The Changing Status of Competition to Cable Television*, No. RCED-99-158, at 9 (July 1999).

[8] *Id.* at 11.

[9] *Id.*

permit them to maintain their position and power in the marketplace. Their ability to extract these concessions and ensure their dominance over emerging and existing competitors has only been enhanced by the recent spate of mergers among these cable behemoths, and their concomitant growth in size and market power.

In short, the competition to cable provided by DBS providers is growing in importance, but is not a panacea for the persistent competitive problems characterizing this industry. Moreover, even DBS providers are enduring anticompetitive obstacles raised by cable incumbents in non-rural areas where DBS and cable incumbents compete head-to-head[10].

C. Despite Claims to the Contrary, Incumbents Continue to Thwart Competition.

The incumbents acknowledge the great benefits of competition -- not only do consumers pay less,[11] but incumbents are forced to "invest in infrastructure to provide more new and original programming and additional services."[12] Yet they will do just about anything to prevent competition in their own back yards. The Competitive Cable Providers know this from being on the receiving end of such tactics as prolonged -- and frivolous -- challenges to the issuance of franchises to new cable entrants, questionable pricing policies to "meet the competition" when a competitor begins service, and refusals to waive exclusive programming deals involving sports and other key offerings that would level the playing-field. The Competitors to Cable also know it because they have seen first hand the charade of cable incumbents transferring core

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[10] Comments of Echostar, pp.3-9; Comments of DirecTV, pp. 2-4; Comments of the Satellite Broadcasters and Communications Association, pp.24-25.

[11] *See* NCTA Comments, at 25.

[12] *See id.* at 6.

programming from satellite to terrestrial delivery in order to evade the Commission's program access rules. Competitors to Cable know it because every day they see programming on the incumbents' systems to which they are denied access or for which they unjustifiably are charged more than the incumbents against which they must compete.

As a result, each of the Competitive Cable Provider's penetration rates has been kept at artificially low levels, preventing any of them from expanding their services fast enough to meet the continuing demand for alternatives to incumbent cable providers, and denying the marketplace the benefits that the incumbents themselves recognize would result from robust competition.

D. The Commission Needs to Renew its Commitment to Competition.

Therefore, in the face of all this, there is no warrant to "roll back" any cable regulations designed to foster greater competition in the MVPD market[13]. To the contrary, these facts require a renewed commitment by the Commission to the letter and the spirit of the 1992 Cable Act (the "Act") -- to protect consumers and enhance competition in this market.

The Commission should start by rectifying its error in the DirecTV and Echostar Comcast SportsNet cases[14] and find that it has ample authority to prevent terrestrial evasion of the program access rules and prohibit program migration whose purpose and effect is to avoid § 628 of the Act ("§ 628"). The Commission should also commit to eliminating other exclusive programming deals however disguised and root out other forms of unfair trade practices by cable

[13] *See* AT&T Comments, at 3, 25.

[14] *DirecTV v. Comcast Corp.*, 13 FCC Rcd 21822 (1998) *recon. pending; Echostar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999), *recon. pending.*

incumbents. The Commission should exert the statutory authority it has been given to address these issues. If the Commission believes it currently lacks adequate statutory authority, the Commission should seek legislation to accomplish these goals.

For example, in the spirit of developing true and open competition in the MVPD market, the Commission should support legislation to prevent exclusive programming deals and discriminatory pricing by all programmers, not just those in which cable incumbents have attributable ownership interests. Such a measure is more important today than ever, given the cable industry's recent round of consolidation and the emergence of a few cable mega corporations that have sufficient market power to command programming exclusivity or preferential pricing as a condition of carriage.

In addition, the Commission should take advantage of its role in reviewing cable company mergers to insist that merging parties consent and adhere to measures that will enhance (or preserve) competition in the markets where the merged entity will operate. In fact, the Commission has a golden opportunity to implement such a merger policy today -- in the context of the proposed merger between AT&T and MediaOne. Other merger proposals in the future should also be considered candidates for such a policy.

Finally, the Commission can and should promote competition in the MDU environment by prohibiting perpetual exclusive contracts[15]. The Coalition believes that the Commission has the authority to prohibit all perpetual exclusive contracts between incumbent cable operators and

[15] The Coalition is not proposing to allow MDU owners to abrogate completely their existing service contracts with MVPDs. Rather, it is proposing only that MVPDs not be permitted to prevent MDU owners from allowing competing video service providers to access owners' buildings to offer competing services to their tenants.

property owners. As Competitive Cable Providers have noted time and again, the vast majority of these contracts, and their continued existence injures the public interest by preventing property owners and their tenants from having an opportunity to select among competing providers.[16] So long as perpetual exclusive contracts continue to frustrate competitive entry into the MDU environment, tenants will never enjoy the benefits of unrestrained, head-to-head competition in the MVPD marketplace. That, obviously, is not what Congress sought to promote, and thus strongly militates in favor of banning all future perpetual exclusive MDU contracts.

III. INADEQUATE ACCESS TO PROGRAMMING AND DISCRIMINATORY PRICING REMAIN SERIOUS OBSTACLES TO THE DEVELOPMENT OF MVPD COMPETITION

Programming is, of course, the very core of the MVPD industry. If competitors do not have reasonable access to programming, nothing else much matters. Consumers do not care about technical details, or legal theories, or economic models. They care about programming and the price they have to pay for that programming. Understandably, therefore, one of the issues most heavily emphasized in the Initial Comments is the difficulty faced by all competitors in gaining fair access to cable programming, and paying a fair price for it.

A. <u>Denial of Program Access</u>.

Across a wide spectrum of competitors, including major ILECs overbuilding cable systems or using wireless distribution, new entities providing broadband video as an integral part of a menu of services, and a variety of competitive cable, wireless cable and DBS companies, there is a remarkable degree of agreement that access to programming remains a serious problem.

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[16] *See, e.g.*, Comments of DirecTV, Inc. at 7.

The Competitive Cable Providers agree also that incumbent, vertically integrated cable companies, particularly the increasingly dominant MSOs, far from accepting the statutory obligations set forth in § 628,[17] have been assiduously promoting industry configurations designed to minimize their competitors' access to essential programming. These efforts include migration of cable programming from satellite to terrestrial distribution and the growing emphasis on clustering. The pendency of the AT&T acquisition of MediaOne exacerbates these problems both nationally and locally. Given the ubiquity of the AT&T's fiber network and MediaOne's MSO status in the cable industry, the opportunities for extensive migration of programming from satellite to terrestrial distribution and the potential for skewed bargaining power for program access are extremely worrisome.

1. **The Commission Should Assert Its § 628 Jurisdiction**.

Perhaps the single most important issue in this proceeding is whether the Commission has properly interpreted and adequately enforced its authority to constrain the anticompetitive practices of the cable industry. The Initial Comments reflect a widespread concern in the competitive portion of the MVPD industry that recent Commission decisions taking a narrow view of Commission authority under § 628 have had the ironic effect of accelerating the migration of cable programming from satellite to terrestrial distribution, specifically to insulate such programming from the reach of § 628. In a recent program access decision, the Commission's Cable Services Bureau (the "Bureau") noted that Congress intended in the Act to rely on the marketplace, as far as possible, to "achieve the availability of a diversity of views and

[17] 47 U.S.C. § 548.

information through cable television and other video distribution media."[18] Significantly, however, Congress enacted § 628 and directed the Commission to use its authority to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[19] The Commission must not allow this migration strategy to succeed because, if it does, the public will experience significant delay in access to competitive offerings.

The Coalition is deeply troubled by recent program access decisions of the Bureau which have uniformly denied competitors access to cable programming.[20] In these cases, the Bureau appears to have adopted the view that it lacks jurisdiction under § 628 to address denial of access to programming if that programming is not currently being carried by satellite, citing the references to satellite cable programming in § 628. The Coalition believes that this is a misreading of the Act and that the Commission has ample jurisdiction under § 628 to address denial of program access without reference to the method of distribution. As contended by RCN, which is currently being denied crucial local sports programming in New York City by the incumbent cable operator Cablevision, § 628 nowhere restricts the Commission's jurisdiction over cable programming access to programming currently distributed by satellite.

The Commission itself has recognized this broader view of the Commission's § 628 jurisdiction in suggesting that migration from satellite distribution in order to evade § 628 would

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[18] *Echostar Communications Corp. v. Fox/Liberty Networks LLC, et al.*, DA 99-1271, *rel.* June 30, 1999) at ¶ 15.

[19] 1992 Cable Act, § 2(b)(5), 47 U.S.C. § 52, Note B.

[20] *See, e.g., DirecTV v. Comcast Corp.*, 13 FCC Rcd 21822 (1998) *recon. pending; Echostar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999), *recon. pending.*

be an adequate basis for Commission jurisdiction.[21] Faced with a widespread and growing problem in securing vital programming, new entrants are justifiably dismayed by the Commission's seeming unwillingness to assert the full panoply of its § 628 jurisdiction. Not only does the Commission consistently refuse to broadly interpret its § 628 authority, it also consistently declines to permit private parties to build a record on the issue of the cable industry's growing evasion of § 628. Indeed, it is striking and very troubling, that the Commission has declined to consider the merits of nearly every program access complaint which has come before it in the last year. In the last year, the Commission has issued decisions in six cases raising program access issues. In those cases, the Commission did not find a single violation of § 628 – not because facts evidencing either an exclusive contract or price discrimination had not been presented, but rather on procedural or jurisdictional grounds.[22] Incumbent cable operators continue to enter anticompetitive exclusive contracts or procure preferential pricing at the expense of the Competitive Cable Providers and all its other competitors and the Commission seems unable or unwilling to deal with these anticompetitive actions.

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[21] Report and Order in *Implementation of the Cable Television Consumer Protection and Competition Act of 1991*, CS Docket No. 97-248, 13 FCC Rcd 15822, 12 CR 1296 (1998), ¶ 71; *see also Echostar at* ¶ 29.

[22] *DirecTV v. Comcast Corp.*, 13 FCC Rcd 2 (1998), *recon. pending* (terrestrial delivery); *Echostar Communications Corp.*, 14 FCC Rcd 2089 (1999), *recon. pending* (terrestrial delivery); *Echostar v. Fox Liberty.*, 13 FCC Rcd 21841 (1998); (price discrimination case barred by statute of limitations); *Echostar v. Outdoor Life & Speedvision*, CSR-5364-P, DA 99-1148 (released June 14, 1999) (breach of contract issue should be decided by court before denial of access to programming issue is decided); *Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sportchannel and Bresnan Communications*, CSR-5381-P, DA 99-1276 (released July 1, 1999) (programming non-vertically integrated); *World Satellite Network v. TCI*, CSR-5287-P, DA 99-1572 (released August 11, 1999) (complainant engaged in purchase of programming for sale to SMATV companies and bulk buyers lacked standing).

2. The Existing Program Access Rules Are Inadequate.

In its current *NOI* the Commission has requested information on the adequacy of the coverage of the program access rules and specifically seeks information on cases of MVPDs "being denied programming by non-vertically integrated programmers."[23] It has been the Coalition members' experience that exclusive agreements between unaffiliated program vendors and incumbent cable operators remain a significant barrier to fair competition, especially when an incumbent operator who controls a large percentage of the regional or national market obtains exclusive agreements and uses them against a competitor in a single market.

In a submission to the FCC related to their then-pending merger, AT&T and TCI represented that TCI had been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases, even though it was under no obligation to do so under the program access rules.[24] In actual practice, however, TCI and its affiliates have refused to discuss the possibility of opening exclusive program agreements. In fact, Hiawatha, a Coalition member, has encountered specific resistance by a large number of potential subscribers to changing from an incumbent affiliate of TCI to Hiawatha, based solely on the availability of one or more of the channels covered by exclusive contracts.

3. Program Access Relief is Critical to Competition.

Relief is needed, for the benefit of cable operators seeking to compete with incumbents. That relief should be in the form of Commission action or legislation. A recent report by the

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[23] *NOI*, ¶ 28.

[24] Reply Comments of AT&T/TCI in CS Docket No. 98-178.

GAO reinforces the need for such action, indicating that some of the experts it interviewed expressed concerns that "dominant cable operators are winning price concessions and may have significant bargaining power vis-à-vis subscription networks even when there is no ownership link." According to the GAO report:

> [M]ost of our expert panel members stated that program suppliers that are not vertically integrated (such as MTV, A&E Network and the Weather Channel) may be very dependent on large cable companies. Some of the expert panel members stated that programming of suppliers that are not vertically integrated should generally be required to be made available to all competitors, as is currently the case for programming owned by vertically integrated suppliers.[25]

Contrary to the arguments of incumbent cable operators, program exclusivity agreements distort competition and are not protected under the Act. The program access rules contained in § 628 establish the minimum activities that are prohibited, and provide the Commission with sufficient flexibility to prohibit additional types of conduct. Indeed, the legislative history of Section § 628 indicates that Congress intended to preclude exclusive contracts between non-vertically integrated entities in situations where there is an absence of a fully competitive market:

> Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market. Thus, the dominance in the market of the distributor obtaining the exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal.[26]

Moreover, in implementing § 628(b) of the Act, the Commission specifically indicated that its authority extended beyond vertically integrated programmers and cable operators stating:

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[25] *GAO Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate: Telecommunications, The Changing Status of Competition to Cable Television*, July 1999, p. 22.

[26] Senate Committee Report, 102-92, to the Cable Act of 1992.

> This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of § 628(b) applies on its face to all cable operators.[27]

As noted above, in its *Fifth Annual Competition Report* the Commission recognized the strategic importance of regional sports programming and the potential negative effects of exclusive agreements on such programming. In summarizing its findings in the *Report,* the Commission indicated that the "distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of [competitors] to compete in the video marketplace" and indicated that it would "continue to monitor this issue and the impact on the competitive marketplace."[28] It is now one year later and such practices have intensified rather than abated. The time for monitoring this issue has passed and the Commission should take affirmative steps to eliminate anticompetitive exclusivity agreements for regional sports programming, as well as other programming.

Entering the market for MVPD services is a customer-by-customer, city-by-city, and program-by-program effort; it is not a tidy abstraction. When local sports programming is withheld from new competitors, as it increasingly is, it is cold comfort to know that the national market share of incumbent cable companies has declined to a mere 82%. The fact remains that such programming is crucial and, with the Commission's approval, is widely withheld by the

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[27] *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd. 3359 (April 1, 1993).

[28] Fifth Annual Report, ¶ 12.

simple device of migrating it to terrestrial distribution. While the Commission has suggested that purposeful evasion of the program access rules is an alternative basis for Commission jurisdiction,[29] the record shows that the Bureau's consistent denial of access to discovery in program access complaints makes it virtually impossible ever to demonstrate on the record that the movement of cable programming from satellite to terrestrial distribution was in fact intended to evade the program access provisions of § 628.[30]

A related issue is that of vertical integration. At present even networks which do not qualify as "vertically integrated" under the Commission's current rules, amounting to a majority of existing networks, have incentives to bow to MSO pressures by refusing to sell programming to the Competitive Cable Providers and all other competitors. Here, too, a large and growing portion of the program production industry either is or claims to be outside the ambit of § 628 and, as in the case of terrestrial distribution, the Bureau has taken a hands-off approach to program access issues.[31] Given industry developments and the Commission's reluctance to intercede, the prospects of the emergence of a competitive industry are actually as much or more in doubt today as they were when cable accounted for virtually all of the MVPD market.

The Commission's NOI also seeks views as to whether regulation as it currently exists is an obstacle to the full development of an MVPD market.[32] There should be no doubt in the

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[29] Report and Order in *Implementation of the Cable Television Consumer Protection and Competition Act of 1991*, CS Docket No. 97-248, 13 FCC Rcd 15822, 12 CR 1296 (1998), ¶ 71.

[30] *See, e.g.*, BellSouth Comments at p. 17.

[31] *See, e.g., Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, DA 99-1276 (CSB, *rel.* July 1, 1999) (sustaining refusal of nonvertically integrated sports programming channel to sell to competing MVPD).

[32] NOI, ¶ 5.

Commission's mind that its pro-cable program access decisions are substantial obstacles to the full development of competition. The Commission appears to have accepted the anti-competitive contentions of the incumbent cable operators and it is therefore the Commission which can significantly improve the prospects for MVPD entry by more aggressively asserting its full authority over cable programming, even when such programming is terrestrially delivered.

The Coalition emphasizes that those relatively few entities which have stepped up to the daunting task of competing with well established cable companies should have the Commission's full support. The Coalition does not contend that regulation is better than market forces to maximize social welfare. It does contend, however, that in the present environment, which remains heavily dominated by the incumbent cable industry, a modicum of statutory and regulatory support is essential to create conditions in which the marketplace can function. If the Commission believes it lacks authority to create conditions in the MVPD industry in which competition can flourish, it should ask Congress for such authority, and it should do so promptly.

B. Incumbent MSOs Use Their Monopsony Power to Obtain Preferential Access and Pricing to Video Programming.

The Initial Comments demonstrate that price discrimination continues to pose a significant barrier to meaningful competition in the MVPD market.[33] The Initial Comments show that, despite the program access rules, large incumbent cable operators increasingly are able to leverage their control over substantial numbers of subscribers to obtain popular video

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[33] Ameritech Comments at 10-13; BellSouth Comments at 12-13; Echostar Comments at 6-7; OpTel Comments at 10. *See also* American Cable Ass'n (ACA) Comments at 4-5 (observing that smaller cable operators generally do not benefit from programming discounts offered to larger systems, increasing their per-subscriber costs).

programming at significant discounts.[34] As a consequence, incumbents have a significant pricing advantage over new entrants, limiting their ability to compete effectively in the market.[35]

OpTel, for example, reported that, in its experience, "the cost of programming, on a per-subscriber basis, for new entrants in the MVPD market is many times that for the large cable MSOs."[36] Likewise, Echostar pointed out that incumbent cable operators are able to use their monopsony power in the programming market to extract preferential rates and terms from independent programmers to the detriment of their competitors.[37] It further noted that independent programmers themselves have acknowledged that cable incumbents leverage their control over large numbers of subscribers to obtain programming at below-market rates.[38]

Ameritech reported that a study it submitted in the Commission's *Horizontal Ownership* proceeding established that, because of their size, incumbent cable operators are able to negotiate

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[34] Echostar Comments at 6; Ameritech Comments at 10; OpTel Comments at 10.

[35] Ameritech Comments at 12.

[36] OpTel Comments at 10.

[37] Echostar Comments at 6.

[38] *Id.* (citing Reply Comments of Lifetime Entertainment Services, IB Docket No. 95-168 at 5 (filed Nov. 30, 1995)). Likewise, vertically-integrated programmers have acknowledged the market power of incumbent operators over independent programmers. *See* Petition for Exclusivity of Outdoor Life Network and Speedvision Network, CSR-5044-P at 23 (filed July 15, 1998) (arguing that cable-affiliated networks are at a distinct competitive disadvantage vis-à-vis independent programmers because they cannot grant exclusive distribution rights to incumbent cable operators).

substantial discounts for popular programming, which are not available to new entrants.[39] That study, which confirms OpTel's and Echostar's observations, utilized several different methodologies to reach the same conclusion – that cable incumbents receive "massive, non-cost justified" discounts (ranging from 14% to 91%, with a mean discount of 45%) from the rates charged to new entrants for programming.[40] A recent study by the GAO similarly found that "small cable operators are likely to pay more for sports programming than large operators," and cited the negotiating power of large cable incumbents as the principal reason for these discounts.[41]

The Dertouzos/Wildman Study cited by Ameritech further established that the magnitude of the discounts offered to incumbent operators cannot be justified by any cost savings associated with delivering programming to larger customers. In particular, it showed that the cost of delivering programming is the same for large and small MVPDs because a cable network's signal covers all cable headends within its broadcast footprint.[42] Likewise, it showed that negotiation cost savings cannot account for more than a minute fraction of the discounts offered

[39] Ameritech Comments at 10 (citing a study by James N. Dertouzos and Steven S. Wildman ("Dertouzos/Wildman Study")) attached to Comments of Ameritech New Media, Inc., In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, MM Docket No. 92-264, at Attachment 2).

[40] Ameritech Comments at 10-11.

[41] *Id.* at 11 (citing General Accounting Office, "Telecommunications, Impact of Sports Programming Costs on Cable Television Rates," Report to the Honorable Byron L. Dorgan, U.S. Senate (June 1999)).

[42] Dertouzos/Wildman Study at 11.